

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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March 27, 2006

In the Matter of

Town of Hamilton

DEP Docket No. 2003-065
DEP File No.9P-3-17-119.01

Town of Topsfield

DEP Docket No. 2003-079
DEP File No.9P-3-17-298.01

Town of Wenham

DEP Docket No. 2003-068
DEP File No.9P-3-17-320.01

Final Decision

I adopt the Recommended Final Decision of the Administrative Magistrate in these three appeals from water withdrawal permit modifications under the Water Management Act, M.G.L. c. 21G. The Recommended Final Decision sustained the Department's more stringent water conservation conditions to limit the impact of the withdrawals on the Ipswich River with minor modifications.

I have adopted the recommendations of the Administrative Magistrate in the Ruling on Legal Issues as they apply to these cases, including the conclusion that the Department may include conditions in a permit establishing conservation requirements to alleviate severe low flow or even "no flow" conditions in the Ipswich River during the summer months. The Department's broad authority to impose permit conditions to

further the purposes of the Water Management Act is clearly reflected in the regulations and supported by the evidence. 310 CMR 36.26(2). Conditions to reduce water use, even where withdrawals are already below authorized volumes and the safe yield of the basin remains uncertain, are justified to prevent “no flow” conditions in the Ipswich River. The reductions in per capita water use already achieved demonstrate the commendable efforts of the towns to manage their supplies – or more accurately to manage their customers, by limiting water use such as residential lawn watering - more efficiently.

Some Petitioners argued that, even if otherwise permissible, permit conditions may not impinge on existing withdrawals because as registrants they have unfettered rights to their registered withdrawal volumes.¹ While there are important distinctions between registration and permits under the Water Management Act, registered withdrawals are not beyond the scope of Departmental authority.² Particularly where safe yield appears to be compromised and conditions on permits that do not affect registered volumes are insufficient to retain at least some flow in a river, the Department has not only the authority but the obligation to act. I conclude, as did the Administrative Magistrate, that the conditions, particularly as to the summer cap, had a permit-related purpose and the towns retained at least a theoretical right to withdraw their registered volumes. See Ruling on Legal Issues (March 25, 2004).

¹ Hamilton argues that even if permit conditions could affect registered volumes, any affect cannot occur during the ten year term of the registration.

²The Water Management Act replaced common law riparian rights in Massachusetts by authorizing the Department to establish a mechanism to manage ground and surface water as a single hydrologic system and to ensure a balance among competing water withdrawals and uses. M.G.L. c. 21G, s. 3. Water withdrawals underway when the Act was passed had priority; existing withdrawals were eligible for registration while new withdrawals were to be allowed under permits. Registration authorizes the continuation of the existing withdrawal for the term, not to exceed ten years, and timely renewal entitles the registrant to another term. M.G.L. c. 21G, s. 5. These appeals involve permits, however, and the permit conditions challenged here do not abrogate the volumes specified in registration statements.

The Department appropriately looks first to conservation as a means to restore safe yield, although the Water Management Act also addresses safe yield by prohibiting the issuance of new permits if the combined volume of existing, permitted and proposed withdrawals will exceed safe yield and by allowing permit applicants to purchase unused volumes held by registrants. M.G.L. c. 21G, s. 8 and 11; 310 CMR 36.20(3)(b) and 36.30(2)(a). While permittees have been required to submit comprehensive conservation plans that are incorporated into permit conditions, the Department is anticipating including conditions on registrations as well to further promote conservation. Under the statute, the Department may condition registrations initially or at time of renewal to specify conservation measures instituted, or to be instituted, by the registrant. M.G.L. c. 21G, s. 5 and 6, 310 CMR 36.06(2) and 310 CMR 36.08.³ The statutory framework is preserved within the context of registered volumes by imposing conditions on permits which may include limitations that affect use of registered volumes and requiring registrants to implement conservation measures.

As to the issue of safe yield, also addressed in an interlocutory ruling, I note that the Department revised its regulations in 2005, replacing the original regulatory

³ The Water Management Act, Section 6, states that a “registration statement must contain . . . conservation measures instituted, or to be instituted, by the registrant.” The Department may impose conditions in renewal registration statements, regardless of whether a registrant did or did not identify conservation measures or seasonal variation in the initial registration statement. 310 CMR 36.08(3). While “conservation measures” is not defined in the statute, generally the term refers to practices to reduce use, loss, or waste of water. The legislature clearly expected conservation to be practiced by all registrants, and conditions for the institution of conservation measures at registration or registration renewal should lower actual withdrawals without lowering the volume authorized under a registration statement. Under the statute, the Water Resources Commission is charged with the task of developing conservation guidelines and the Department’s program must conform to those guidelines. M.G.L. c. 21G, s. 3. The Water Resources Commission has in fact developed Water Conservation Standards, which are appropriate conservation measures for registrants. Registrants must comply with their registration statements, both the registered volume and any conditions, and any failure to comply would constitute a violation of the regulations. Registrations will be renewed in 2008.

definition and calculation methodology with the statutory definition.⁴ The technical difficulties in determining safe yield have unquestioningly complicated the permitting of water withdrawals. The Department is working on a more refined approach to the determination of safe yield and will confirm the safe yield for the Ipswich when that research is concluded and a methodology is adopted.⁵

Finally, I am concerned about the time and expense of litigation of these Water Management Act permits. The regulations have extensive requirements for public notice of an application in newspapers and directly to identified parties, distribution of a summary of the application, notice in the Environmental Monitor, a 30 to 45 day public comment period, a public hearing, and a requirement that the applicant respond to public comments. 310 CMR 36.22, 310 CMR 36.23. Although an adjudicatory hearing is “de novo,” I encourage those affected by these permits to participate by submitting comments so that the Department has a full record for its decision. The Department will take these comments into account in reviewing the application and considering the required factors for issuance of a permit. 310 CMR 36.26. In addition, the Department will consider a regulatory revision so that it would formally accept comments on a draft permit, as it does for discharge permits under the Clean Water Act. See 314 CMR 2.00. The Department’s permit proceedings work best when interested persons – municipalities and

⁴ The Ruling on Issues to be Adjudicated: Safe Yield (April 2, 2004) refers to a regulatory provision that has been substantially revised. I adopt the approach to this issue recommended by the Administrative Magistrate for purposes of conducting these evidentiary hearings. The statute establishes safe yield as the maximum amount of water that may be withdrawn under registrations and permits, which assumes some reserved amount to ensure the security of the withdrawal volumes and to preserve the resource itself. A safe yield determination normally precedes the permit proceedings; the “balancing” of factors taken into account in the issuance of permits is not part of determining safe yield.

⁵ The classification of stressed basins by the Water Resources Commission provides an appropriate basis for permit conditions, absent site-specific studies as were available here. I also note that the statute requires water to be managed as a single hydrologic unit by water source, generally the basin or a hydrologically distinct sub-basin, and not by municipal boundaries.

nonprofit environmental groups in this case – need not rely on litigation to pursue their interests.⁶

The parties to this proceeding are notified of their right to file a motion for reconsideration of this Decision, pursuant to 310 CMR 1.01 (14)(d). The motion must be filed with the Docket Clerk and served on all parties within seven business days of the postmark date of this Decision. Any party may appeal this Decision to the Superior Court pursuant to M.G.L. c. 30A, §14(1). The complaint must be filed in the Court within thirty days of receipt of this Decision.

This final document copy is being provided to you electronically by the Department of Environmental Protection. A signed copy of this document is on file at the DEP office listed on the letterhead.

Robert W. Golledge, Jr.
Commissioner

⁶ As stated in the Recommended Final Decision, an Administrative Magistrate will sustain the Department's permit conditions as long as they are within the Department's authority and reasonable in light of the record, even if there may be a persuasive case for an alternative. Therefore, interested persons should seek to influence the contents of the permit through comments to the Department prior to issuance.